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EMERGENCY

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, DIVISION OF ELECTIONS, GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA, DIVISION OF ELECTIONS, and STAND TALL WITH MIKE, an independent expenditure group, Appellants, v. RECALL DUNLEAVY, an unincorporated association, Appellee.	Case No. S-17706 Superior Court No.: 3AN-19-10903CI

MOTION TO LIFT STAY PENDING APPEAL

In a written decision issued on January 14, 2020, the superior court held that Recall Dunleavy's recall application should have been certified by the Division of Elections, and it ordered the Division to provide petition booklets to Recall Dunleavy by no later than February 10, 2020, so that Recall Dunleavy could begin collecting the more than 71,000 signatures needed to cause a recall election.[1] Intervenor Stand Tall With Mike ("STWM") then sought and, over opposition, obtained a stay pending appeal from the superior court on January 29, 2020.[2] Because the superior court failed

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[1] *See* Order re: Plaintiff's Motion for Summary Judgment, Defendants' Cross-Motion for Summary Judgment, and Intervenor's Cross-Motion for Summary Judgment at 18 (Jan. 14, 2019) [hereinafter S.J. Order] (Appendix A).

[2] Order Granting Stay Pending Expedited Appeal (Jan. 29, 2019) [hereinafter Order Granting Stay] (Appendix E).

to apply the correct standard when issuing a stay, and Recall Dunleavy faces irreparable harm that cannot be adequately protected during the stay, this Court should lift the stay and order the State to immediately deliver recall petition booklets to Recall Dunleavy. Alternatively, if this Court grants Recall Dunleavy's simultaneously-filed request for an expedited briefing schedule culminating in a February oral argument and decision, Recall Dunleavy will withdraw this motion to lift stay pending appeal.[3]

An assurance of a decision within the month is a reasonable compromise, which addresses both Recall Dunleavy's interests in having the recall process move forward quickly, as envisioned by the Alaska statutes, *and* the interests of the superior court in avoiding the potential confusion that voters could face if this Court, for example, upheld the superior court's decision to certify the recall application, but modified the petition language in some respect.

Recall Dunleavy disagrees that the possibility of voter confusion is a reason to stay signature-gathering. Recall Dunleavy is irreparably harmed by any stay; by contrast, no party is harmed if the signature-gathering proceeds. Thus, if the Court cannot minimize the harm to Recall Dunleavy by committing to a decision before March 1, following expedited briefing, then this Court should lift the stay pending resolution of this appeal and allow signature-gathering to proceed.

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[3] This motion is supported by the Affidavit of Jahna M. Lindemuth and the Emergency Motion to Expedite Request for Scheduling Conference and Motion to Lift Stay, filed herewith.

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I. FACTUAL BACKGROUND

Recall Dunleavy, with signatures from 46,405 qualified Alaskan voters, filed its application to recall Governor Michael J. Dunleavy with the Division on September 5, 2019.[4] Approximately 60 days later, the Division issued a decision denying certification of the application.[5]

The following day, Recall Dunleavy filed suit to challenge that rejection. It sought expedited consideration in the superior court, pointing out that, "every day of delay denies the citizens of Alaska the opportunity to lawfully exercise their right to recall . . . as guaranteed by article XI, section 8 of the Alaska Constitution."[6] An expedited summary judgment briefing schedule was set, culminating in oral argument and an oral decision on January 10, 2020.

In the superior court's ruling on January 10—reiterated in a written decision on January 14—the superior court determined that, although one factual allegation should be struck from the recall application, the application otherwise should have been certified in full.[7] The superior court ordered the Division to prepare and issue recall

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4 *See* S.J. Order at 2 (Appendix A).

5 *See id.* at 3 n.2 (Appendix A).

6 Plaintiff's Emergency Motion for Expedited Scheduling Conference to Address Briefing and Decision Schedule at 2 (Nov. 5, 2019).

7 *See* S.J. Order at 18 (Appendix A).

petitions to Recall Dunleavy "no later than February 10, 2020, unless that date is stayed by the Alaska Supreme Court."[8]

STWM moved to stay that order pending an expedited appeal.[9] Recall Dunleavy opposed the motion for stay.[10] After oral argument on January 29, the superior court granted STWM's requested stay, enjoining the constitutional right to collect signatures on the certified petition booklets until after this Court rules.[11]

II. STANDARD OF REVIEW

"In considering whether to grant [a stay], . . . [a] court must consider criteria much the same as it would in determining whether to grant a preliminary injunction."[12] Although this Court ordinarily reviews the issuance of a stay for abuse of discretion, this Court reviews de novo the superior court's legal determinations in issuing a stay.[13]

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8 *Id.* (Appendix A).

9 STWM's Motion for Stay Pending Expedited Appeal (Corrected) (Jan. 15, 2020) [hereinafter Mot. for Stay] (Appendix B). The State did not join the request for stay, but indicated it did not oppose a stay. *See* State's Non-Opposition to Intervenor's Motion for Stay (Jan. 22, 2020) [hereinafter Non-Opposition] (Appendix C).

10 Plaintiff's Opposition to STWM's Motion for Stay Pending Appeal (Jan. 21, 2020) [hereinafter Opposition to Mot. for Stay] (Appendix D).

11 Order Granting Stay (Appendix E).

12 *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1973) (citing 7 J. Moore, Federal Practice 62.05, at 62-24 (2d ed. 1972)).

13 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (citing *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 455 (Alaska 2006)).

Under Alaska Appellate Rule 205, this Court—or even an individual justice—may lift or modify a stay pending appeal imposed by the superior court.

A stay pending appeal may be ordered when a party meets "either the balance of hardships or the probable success on the merits standard."[14] Under the balance of hardships test, courts must balance "the harm [a party] will suffer without the injunction against the harm the injunction will impose on the [other party.]"[15] A stay is warranted under the balance of hardships standard only if the movant establishes that: (1) it is faced with irreparable harm absent a stay; (2) the opposing party is "adequately protected" despite the stay; and (3) the movant raises "serious and substantial questions going to the merits of the case."[16]

By its terms, this test is inapplicable if the opposing party will be injured by the stay, and the injury is not "slight in comparison" to the harm the movant would suffer without a stay.[17] Under those circumstances, courts must apply "the probable success

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14 *Id.* (citing *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970), *modified in other respects*, 483 P.2d 198 (Alaska 1971)).

15 *Id.* (citing *A.J. Indus.*, 470 P.2d at 540).

16 *Id.* (quoting *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1273 (Alaska 1992)).

17 *Id.* at 54-55 (quoting *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991)).

on the merits test."[18] Under that test, a stay is improper unless the movant meets "the heightened standard of a '*clear* showing of *probable* success on the merits.' "[19]

III. ARGUMENT

A. The Superior Court Erred By Applying The Wrong Standard For A Stay.

In granting STWM's motion for stay pending expedited appeal, the superior court erroneously applied the balance of hardships standard.[20] Finding that there might be voter confusion if this Court later changes the stated grounds in the recall petition, the superior court purported to balance harms without considering whether Recall Dunleavy could be adequately protected.[21] The superior court should have applied the probable success on the merits test because Recall Dunleavy's interests cannot be protected during a stay; nothing short of providing the petition booklets will "adequately protect[]" Recall Dunleavy's interests.[22] By staying its order to deliver petition booklets until after the appeal is decided, the superior court enjoined exercise

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18 *Id.* at 56 (citing *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 979 (Alaska 2005)).

19 *Metcalfe*, 110 P.3d at 978 (emphasis added) (quoting *Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d at 1272).

20 *See* Order Granting Stay (Appendix E).

21 *Id.* (Appendix E).

22 *Alsworth*, 323 P.3d at 54.

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of Recall Dunleavy's constitutional right to gather signatures as if Recall Dunleavy had lost on the question of whether its recall application was valid.

The people's constitutional right to recall an elected official is meant to proceed expeditiously. Once a petition is certified—and the second round of signatures is submitted—statutes require the Division to call an election within strict deadlines.[23] Proponents of recall have a heavy burden to get to that point. After gathering over 46,000 valid signatures to submit with its recall application, Recall Dunleavy now must collect over 71,000 signatures in the next signature-gathering phase, which obviously it cannot start until the recall petition booklets are provided. Had the State not improperly denied certification back in November, it is likely that the second round of signatures would have been submitted in December and counted in January, meaning a recall election would already be scheduled for a date less than 90 days from now. Because of the ongoing, irreparable harm that occurs when a party seeking a vote of the people is delayed by the State in its effort to put the issue on the ballot, this Court repeatedly has found that any request for stay in an elections-related case must be analyzed under the probable success on the merits test.[24]

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[23] *See* AS 15.45.620 (giving the Division 30 days after submission of recall petition booklets to review signatures); AS 15.45.650 (requiring a special election between 60 and 90 days after a sufficient number of signatures for the recall petition have been verified); *see also* Opposition to Mot. for Stay at 5 (Appendix D).

[24] *See Metcalfe*, 110 P.3d at 979 ("[I]ssuance of this [stay] is a zero-sum event, where one party will invariably see unmitigated harm to its interests. Accordingly, we require . . . demonstrat[ion of] a clear showing of probable success on the merits.");

Under the legally correct test, STWM must demonstrate a clear probability of success on the merits. It cannot make that showing. The superior court certified the recall application by carefully applying over three decades of recall precedent from this Court, three well-reasoned superior court decisions, and a host of attorney general opinions on recall.[25] The Division and STWM recognize that, in order for them to prevail on appeal, this Court will need to adopt a new, more restrictive interpretation of existing precedent on state recalls.[26] This alone makes it unlikely that they will clearly succeed on the merits of this appeal, something the superior court did not come close to deciding when granting the stay.[27]

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see also Order Denying Defendants' Motion for Stay Pending Appeal, *Alaskans for Better Elections v. Kevin Meyer et al.*, 3AN-19-09704CI, at 1-2 (Oct. 30, 2019) ("It is appropriate to apply [the probable success on the merits] standard . . . because [of] the irreparable harm Plaintiff faces if a stay is granted . . . . The posting of a bond fails to protect the time that Plaintiff will lose to gather signatures . . . ." (citing *Alsworth*, 323 P.3d at 54-55)) (Appendix F).

[25] S.J. Order at 18 (Appendix A); *see also Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287 (Alaska 1984); *von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055 (Alaska 1995).

[26] *See* Mot. for Stay (Appendix B); Non-Opposition (Appendix C).

[27] Order Granting Stay at 2 (determining only "that the Intervenor and [the State] raise a serious issue on appeal") (Appendix E).

Because the superior court improperly granted a stay under the wrong legal standard, this Court should reverse the stay pending expedited appeal and order the Division to provide petition booklets to Recall Dunleavy immediately.[28]

B. Even Under The Balance Of Hardships Standard, A Stay Should Not Have Been Entered.

Even if the superior court was permitted to review STWM's request under the balance of hardships standard, it misapplied that test in two ways.

First, the superior court did not make any findings on the harm to Recall Dunleavy from granting a stay or whether Recall Dunleavy's interests could be adequately protected.[29] Had the court asked the right questions about harm to Recall Dunleavy, the answer would have been obvious: Recall Dunleavy cannot be adequately protected—so there is no basis for concluding that the balance of hardships tips in favor of STWM.

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[28] *See* S.J. Order at 18 (Appendix A). Alternatively, this Court should grant Recall Dunleavy's simultaneously-filed motion for scheduling conference under Alaska Appellate Rule 503.5(e) and set a briefing schedule which culminates in oral argument in February. *See infra* Section III.C.

[29] *Alsworth v, Seybert*, 323 P.3d 47, 54-55 (Alaska 2014) ("[T]he balance of hardships standard 'applies only where the injury which will result from the [stay] . . . can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted. Where the injury which will result from the [stay] . . . is not inconsiderable and may not be adequately indemnified by a bond, a showing of probable success on the merits is required . . . .' " (sixth alteration in original) (quoting *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991))).

Second, the superior court erred by finding that STWM and/or the public would be irreparably harmed if Recall Dunleavy is allowed to collect signatures while an appeal is pending.[30] Any risk of an adverse decision is on Recall Dunleavy—not STWM. If this Court were to reverse the superior court entirely, it is Recall Dunleavy that would have spent its time and money unnecessarily collecting signatures. If STWM wants to campaign against recall during the signature-gathering, that is its *choice*, but the choice to spend money and energy is not a harm comparable to the loss of a constitutional right. Even the ephemeral harm of possible voter confusion—which is what the superior court stressed as its basis for granting the stay—is not irreparable.[31] As the recall process proceeds toward election, substantial campaigning by both sides will occur. On election day, a final, approved statement of grounds—along with any rebuttal—will be available at every polling location.[32] Moreover, at any time before the signatures are submitted, if this Court modifies the grounds of the petition, any voter who changes his or her mind about signing the recall petition may withdraw his or her signature.[33]

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30 *See* Order Granting Stay (Appendix E). The Division did not join the request for stay. *See* Non-Opposition (Appendix C).

31 *See* Order Granting Stay (Appendix E).

32 AS 15.45.680.

33 *See* AS 15.45.590.

Recall Dunleavy is unaware of any previous case in which a state court enjoined signature-gathering pending review by this Court. There is no reason why this Court should prevent signature-gathering from taking place now pending appeal of the certification.[34]

C. If This Court Sets An Expedited Briefing And Decision Schedule Culminating In A February Oral Argument, Recall Dunleavy Will Withdraw This Motion.

Recall Dunleavy has simultaneously filed an unopposed request for a scheduling conference to determine an expedited schedule for resolving this appeal.[35] If this Court grants Recall Dunleavy's request for oral argument in February—either by relying on the briefing before the superior court or through expedited briefing—Recall Dunleavy will accept the commitment to a speedy decision as an appropriate compromise of all parties' interests in clarity and efficiency, and would withdraw this motion to lift the stay.

IV. CONCLUSION

Because the superior court improperly granted a stay pending appeal based on a misapplication of the law, this Court should REVERSE the superior court's stay

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[34] In *Mallott v. Stand for Salmon*, this Court certified an initiative, allowing it to go to a vote of the people without a new collection of signatures, after significantly changing it. 431 P.3d 159, 170-77 (Alaska 2018); *see also Bess v. Ulmer*, 985 P.2d 979, 996 (Alaska 1999) (changing the language of a ballot initiative without requiring proponents to re-gather signatures).

[35] Request for Scheduling Conference Under Rule 503.5(e) and Memorandum Concerning Recall Dunleavy's Proposed Schedule (Feb. 3, 2020).

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pending appeal. This Court should order the Division to provide recall petition booklets to Recall Dunleavy immediately.

DATED this 3 day of February 2020, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, PC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February 2020, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY, an unincorporated association Plaintiff, vs. STATE OF ALASKA, DIVISION OF ELECTIONS, AND GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS Defendants.	
STAND TALL WITH MIKE, an independent expenditure group Intervenor.	3AN-19-10903 CI

Order Re:

I. Plaintiff's Motion for Summary Judgment
II. Defendant's Cross-Motion for Summary Judgment
III. Intervenor's Cross-Motion for Summary Judgment

Plaintiff moves for summary judgment on the grounds that its recall application states proper grounds. Defendants State of Alaska, Division of Elections and Gail Fenumiai, Director, State of Alaska Division of Elections (Defendant) and Intervenor Stand Tall with Mike (Intervenor) each filed cross-motions for summary judgment on the grounds that the 200-word statement of the grounds for recall is not factually and legally sufficient. All parties agree that a motion for summary judgment is the proper procedural vehicle for the court to render a judgment on the issues presented. There is no dispute about which words in the application the Director of Elections rendered an opinion; there only remains a legal analysis of whether the grounds as stated in the application meet the

legal sufficiency required in AS 15.45.470-15.45.710.

The Court does not decide whether the allegations are true or not – that is the job of the voters. Neither does the Court weigh the allegations to determine whether an allegation, even if true, is a reason why the voters should or should not recall an elected official.

Background

On September 5, 2019, a recall committee filed an application to recall Governor Michael J. Dunleavy. The application provides the following allegations as grounds for recall:

> Neglect of Duties, Incompetence, and/or Lack of Fitness, for the following actions:
> 1. Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.
> 2. Governor Dunleavy violated Alaska law and the Constitution, and misused state funds by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters.
> 3. Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.
> 4. Governor Dunleavy acted incompetently when he mistakenly vetoed approximately $18 million more than he told the legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over $40 million in additional federal Medicaid funds.
>
> References: AS 22.10.100; Art. IX, sec. 6 of Alaska Constitution; AS 39.52; AS 15.13, including .050, .090, .135, and .145; Legislative Council (31-LS1006); ch.1-2, FSSLA19; OMB Change Record Detail (Appellate

Courts, University, AHFC, Medicaid Services).[1]

The Defendant denied certification of the recall application because "the statement of grounds for recall are not factually and legally sufficient for purposes of certification," but the Director found that the application met all other requirements of the statutes.[2] Plaintiff brought this case to challenge the decision.[3]

Standard of Review

Summary judgment is appropriate when there are no genuine issues of material fact, and the case can be decided as a matter of law.[4] When reviewing the legal sufficiency of allegations in recall petitions, the court's approach is that of a motion to dismiss for failure to state a claim, and the court must construe the application liberally and accept the allegations as true.[5] Courts apply an "independent judgment" standard to issues of law and do not defer to the Director of Elections' decision.[6]

The Court will decide whether each allegation, if taken as true, supports one or more of the grounds provided by the Legislature.[7] The Court will review whether the law

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[1] "These references include: (1) the judicial appointment statute which Governor Dunleavy refused to follow; (2) a constitutional provision and statutes relating to Governor Dunleavy's unlawful partisan mailers and electronic advertisements, along with a specific related legislative legal opinion; (3) Governor Dunleavy's own explanation of his appellate court line-item veto; (4) Governor Dunleavy's June 28, 2019 vetoes, along with specific examples of their impacts on the health, education, and welfare of Alaskans; and (5) Governor Dunleavy's mistaken veto of Medicaid funds, and an explanation of his intended veto that shows his error." Pl.'s Reply in Supp. of Mot. for Summ. J. and Opp'n to Defs.'s and Interv.'s Cross-Mot. for Summ. J.s.

[2] Gail Fenumiai letter to Joe Usibelli Sr. on November 4, 2019 (denying certification for recall).

[3] The DOE denied certification of the recall application on November 4, 2019 "solely because the statement of grounds did not comply with the statutory requirements." Opp'n to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. n 15.

[4] See Christensen v. Alaska Sales & Serv., Inc., 335 P.3d 514, 516-21 (Alaska 2014).

[5] See von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd., 903 P.2d 1055, 1059 (Alaska 1995) (taking "the facts alleged in the first and fourth paragraphs as true and determine whether such facts constitute a prima facie showing of misconduct in office or failure to perform prescribed duties") (internal citations omitted).

[6] See Wielechowski v. State, 403 P.3d 1141, 1146 (Alaska 2017).

[7] See AS 15.45.570.

actually prohibits the alleged conduct.[8] To determine particularity and notice, the Court limited its review to the 200 words in the Plaintiff's application. The Court considered and discussed the Plaintiff's factual theories for each allegation only to provide context to the reader.

It is the Legislature's role, not the judiciary's, "to prescribe both the procedures and the grounds for recall. The political nature of the recall makes the legislative process, rather than judicial statutory interpretation, the preferable means of striking the balances necessary to give effect to the Constitutional command that elected officers shall be subject to recall."[9] Voters are the trier of fact, and "make their decision in light of the charges and rebuttals."[10]

Discussion

I. Applying the Particularity Requirement

Article XI of Section 8 of the Alaska Constitution states,

> All elected officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the Legislature.

The Alaska Legislature enacted AS 15.45.470-.700 and AS 29.26. 28-.360 to prescribe the specific processes to recall state and municipal elected officials respectively. Though the specific grounds for recall are different for state versus municipal officers, the

[8] See von Stauffenberg, 903 P.2d at 1060.
[9] Meiners v. Bering Strait Sch. Dist., 687 P.2d 287, 296 (Alaska 1984) ("Like the initiative and referendum, the recall process is fundamentally a part of the political process. The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute").
[10] Id. at 301.

requirement for particularity within 200 words is the same.[11] The Alaska Supreme Court in Meiners and von Stauffenberg held that when reviewing a recall application, the statutes should be construed liberally and the allegations accepted as true, so as to protect the right of the people to vote and express their will.[12]

The Alaska Supreme Court decided Meiners and von Stauffenberg in 1984 and 1995 respectively. The Legislature re-visited the Title 15 recall statutes in 2000,[13] 2005,[14] and 2006,[15] but has neither rejected, explicitly or implicitly, the Alaska Supreme Court's interpretation of the recall statutes.

This Court is obligated to faithfully interpret and apply the Alaska Constitution and the laws of this state as created by the Legislature. This Court declines the invitation of the Attorney General and the Intervenors to expand the holding of Meiners and von Stauffenberg contrary to the Legislature's implicit adoption of those holdings. Further, this Court declines to restrict the voters' right to affirmatively take action to admonish or disapprove of an elected official's conduct in office as voters have a right to do so through the initiation, referendum, and recall process.

AS §15.45.550 provides bases of denial of certification. AS 15.45.500(2) requires that "the grounds for recall [be] described *in particular* in not more than 200 words" (emphasis added). The Alaska Supreme Court confirmed in both Meiners and von Stauffenberg that the particularity requirement is effectively a notice pleading standard

[11] Compare AS 15.45.500(2) ("described in particular"), with AS 29.26.260(a)(3) ("stated with particularity").
[12] See von Stauffenberg, 903 P.2d at 1057; Meiners, 687 P.2d at 291.
[13] See SLA 2000, ch. 21, § 59.
[14] See 1st Sp. Sess. 2005, ch. 2, § 46.
[15] See ch. 38, § 5, eff. May 19, 2006.

with "[t]he purpose of . . . giv[ing] the officeholder a fair opportunity to defend his conduct."[16] The standard for particularity is "whether a particular alleged act 'is not [so] impermissibly vague' that the official cannot respond."[17]

II. Interpreting the relevant grounds for recall

There have been several Alaska Superior Court decisions that have defined the grounds for recall for state elected officials. AS 15.45.510 establishes four grounds for recall: (1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption. Alaska Superior Court judges have consistently treated the Alaska Supreme Court's recall decisions regarding local officials to be controlling for recall applications of statewide officials.[18]

In Coghill, decided in 1993, the Court defined the term "incompetence." In Valley Resident, decided in 2004, the Court defined "lack of fitness" and "neglect of duties." In Citizens, decided in 2006, the Court defined "lack of fitness" in alignment with Valley Resident.

As discussed previously, the Alaska Legislature affirmatively reviewed and made amendments within the Title 15 recall statutes, but did not make any changes to or define the recall grounds as stated in AS 15.45.510. This Court interprets the Legislature's silence post-decision in Coghill, Valley Residents, and Citizens as the Legislature's acceptance and approval of the definitions used by the courts.

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[16] Meiners, 687 P.2d at 302.
[17] Id.
[18] See Coghill v. Rollins, Memorandum Decision, No. 4FA-92-1728CI (Alaska Super., 14, 1993) (Savell, J.); Valley Residents for a Citizen Legislature v. State, Order Regarding Pending Motions, No. 3AN-04-6827CI (Alaska Super., Aug. 24, 2004) (Gleason, J.) (Appendix B); Citizens for Ethical Government v. State, Transcript of Record, 3AN-05-12133CI, at 5-6 (Stowers, J.).

1. **Lack of fitness**

In Valley Residents, the court defined the statutory recall ground, "lack of fitness" as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office."[19] The target for recall, Senator Ogan allegedly promoted his employer in legislative committee through his voting, and failed to recognize an obvious conflict between his respective duties to his employer and to his constituents. The Court found that the stated ground for recall was legally sufficient because it alleged a violation of the Legislative Ethics Act.

The definition applied by the Court in Valley Residents is logical and would give an elected official reasonable notice. This court finds that "suitability for office" can describe the person's ethical and moral fitness for the office. Including ethical and moral fitness is consistent with the oath of office every public officer must take – to faithfully discharge his duties.[20]

Defendant and Intervenor argue that "unsuitability for office" "is so vague and subjective that it would amount to the kind of purely political, no-cause-required recall that the constitutional delegates expressly rejected."[21] While "unsuitability" is a broad term, when connected to specific conduct as alleged, it is sufficient to place the elected official on notice to defend against the allegations.

Defendant's suggestion to define "lack of fitness" in terms of mental or physical

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[19] Valley Residents, Order Regarding Pending Motions, at *10; see also Citizens, Transcript of Record at 5-6, 3AN-05-12133CI (Alaska Super. Jan. 4, 2006) (defining lack of fitness as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office") (Appendix C); Coghill, Memorandum Decision, No. 4FA-92-1728 CI (Alaska Super. Sept. 14, 1993).

[20] See also, Alaska Const. art. III, § 16 ("The governor shall be responsible for the faithful execution of the laws").

[21] See Opp'n. to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. 28.

ability, as in Alaska's Business and Professions Code is problematic.[22] "Recall applications are intended to be easy for laypeople to prepare without lawyer assistance."[23] Furthermore, there are other processes in place to remove a governor from office based on mental or physical ability.[24] Last, the Legislature has declined to adopt the Business and Professions Code definition and this Court declines to further restrict the meaning of a definition that the Legislature has implicitly approved.

This Court will apply the "lack of fitness" definition applied in the Valley Residents decision and accepted by the Legislature. The Court considers an official's ethical and moral fitness to fall within the term "suitability."

2. Incompetence

In Coghill v Rollins, the Court defined "incompetence" in Title 15 as "lack of [the] ability to perform the official's required duties."[25] Lieutenant Governor Coghill was alleged to be unfamiliar with Alaska's election code despite overseeing elections, and therefore the Court concluded that the allegation of incompetence was legally sufficient.[26] On a moot appeal, the Alaska Supreme Court declined to address the definition of "incompetence."

Defendant and Intervenor suggested additional requirements of harm or multiple acts. That type of information, while relevant, goes to the weight of the evidence rather

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[22] See Att'y Gen. Clarkson Op. at 15-16 (Exhibit 2).
[23] See Meiners, 687 P.2d at 301.
[24] See, e.g., Alaska Constitution Art. III, sec. 12 ("Whenever for a period of six months, a governor has been . . . unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant").
[25] Coghill, Memorandum Decision, 4FA-92-01728CI, at 21 (Alaska Super. Sept. 14, 1993) (Appendix D).
[26] Id. at 22.

than to clarify whether the official, as measured by his/her act or inaction, lacked the ability required. If an official is alleged to have failed to perform a duty or has done so poorly, the nature of the failure or the quality of the work is up to the voters to weigh. Additionally, in Coghill, the mere allegation that Lieutenant Governor was unfamiliar with the law he was charged with administering was adequate to establish a ground for recall due to incompetence.[27] In other words, harm was not required to show incompetence.

The Court declines to expand or restrict the definition of "incompetence" when the Legislature has declined to do so. The Court will apply the same definition as used in the Coghill decision.

3. Neglect of duty

In Valley Residents, the Court defined "neglect of duty" as "the nonperformance of a duty of office established by applicable law."[28]

In this case, Defendant compared "neglect of duty" to the concept of "nonfeasance," which Minnesota, Virginia, and Washington have defined to require an intentional act.[29] Defendant compared neglect of duty to violating one's oath of office.[30] Additionally, Defendant distinguished between trivial and non-trivial errors and omissions.[31] While these arguments are reasonable, this Court does not have the

[27] Id. at 24-25.
[28] Valley Residents, Order Regarding Pending Motions, at 9.
[29] See, e.g., No. AGO No. 2019200686, 2019 WL 5866609, at *7 (Alaska A.G. Nov. 4, 2019) (citing MN ST § 211C.01(2); In re Proposed Petition to Recall Hatch, 628 N.W.2d 125, 128 (Minn. 2001); Chandler v. Otto, 693 P.2d 71, 73-74 (Wash. 1984); Warren v. Commonwealth, 118 S.E.2d 125, 126 (Va. 1923)).
[30] See id.
[31] See id.

discretion to create a more stringent definition than has already been used by the courts, and the Legislature has accepted. As Plaintiff suggests, "it is up to the voters to decide whether a particular failure to act constitutes neglect of duty sufficient to warrant removal from office."[32]

This Court will use the definition of "neglect of duties" as applied in the Valley Residents decision and not rejected by the Legislature.

III. Which, if any, of the five allegations are sufficient to go to a vote?

Plaintiff argues three grounds for recall: (1) lack of fitness, (2) incompetence, and (3) neglect of duties.[33] The grounds for recall that are sufficient "must be set forth on the ballot in full, as contained in the petition, without revision."[34]

1. **Allegation:** "Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations."

The Constitution states: "The governor shall fill any vacancy in an office of . . . superior court judge by appointing one of two or more persons nominated by the judicial council."[35] AS 22.10.100 codifies this duty and provides: "The governor shall . . . appoint a successor to fill an impending vacancy in the office of superior court judge within 45 days after receiving nominations from the judicial council."[36] The Governor has discretion over whom, but not whether to appoint a new judge, nor does the Governor

[32] Pl.'s Mot. for Summ. J. 12.
[33] The Supreme Court of Alaska has not yet defined these grounds.
[34] Meiners, 687 P.2d at 303.
[35] Alaska Const. art. IV, § 5.
[36] AS 22.10.100(a).

have the discretion to exceed the 45 day deadline.

Plaintiff alleges that Governor Dunleavy failed to fill a judiciary seat in Palmer Superior Court within the 45 days prescribed by law.[37]

Governor Dunleavy had a legal duty to select a candidate within the time prescribed by the Legislature. If the allegations are true, his failure to select a candidate by the prescribed date could demonstrate to a voter that: he "lacks fitness" because he did not obey the law; that he is "incompetent" because he did not understand his duty to conduct his due diligence on the candidates or process before the expiration of the statutory deadlines; and/or that he "neglected his duty" because he failed to appoint a new judge within the time given by statute. This allegation is legally sufficient.

2. **Allegation:** "Governor Dunleavy violated Alaska law and the Constitution, and misused state funds by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters."

Plaintiff alleges that Governor Dunleavy allowed the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers.[38]

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[37] The Plaintiff provided additional information within their briefing. The Alaska Judicial Council processed and vetted 13 applications for the positions and nominated three candidates. Those candidates' names were transmitted to Governor Dunleavy on February 4, 2019, thus giving the Governor until March 21, 2019 to select two of the three candidates. Governor Dunleavy allegedly appointed the final nominee to the position on April 17, 2019, 72 days after the Council forwarded its list of nominees. The Court does not rely on that information to determine particularity but does review that information to understand the Plaintiff's theory of their allegation.

[38] The Plaintiff provided additional information within their briefing. Plaintiff alleges that Governor Dunleavy has spent $18,902, $8,173, and $3,312, of public funds on partisan advertising through three Facebook pages entitled "Restore the PFD," "Repeal SB91," and "Cap Government Spending," respectively. These pages allegedly include advertisements that attack politicians who disagreed with Governor Dunleavy, support politicians that have favored

Plaintiff argues that Governor Dunleavy's conduct violated the Executive Branch Ethics Act, Alaska's campaign finance laws, and article IX, section 6 of the Alaska Constitution. AS 39.52.120(b) ("The Executive Branch Ethics Act") provides, in relevant part:

> A public officer may not . . .
> use or authorize the use of state funds . . . for partisan political purposes. . .
> [I]n this paragraph, "for partisan political purposes"
> (A) means having the intent to differentially benefit or harm a
> (i) candidate or potential candidate for elective office; or
> (ii) political party or group;
> (B) but does not include having the intent to benefit the public interest at large through the normal performance of official duties.

Plaintiff argues that Governor Dunleavy's actions constitute a violation of the Ethics Act because they were intended "to differentially benefit or harm" specific candidates, potential candidates, or political groups, instead of intending to "benefit the public interest at large."[39]

Alaska's campaign finance laws require: (1) a clear indication of who paid for a communication;[40] (2) specific language distancing an independent group from a particular candidate;[41] and (3) prior registration with APOC.[42]

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these campaigns, and promote Governor Dunleavy personally. Additionally, Governor Dunleavy's office has allegedly admitted to spending approximately $3,500 of public funds to print and distribute "campaign-style literature" supporting particular politicians who voted for positions that Governor Dunleavy favors, without disclosing who paid for them. The Court does not rely on that information to determine particularity but does review that information to understand the Plaintiff's theory of their allegation.

[39] See AS 39.52.120(b)(6); see also Memorandum from Daniel C. Wayne, Legislative Counsel, Legislative Affairs Agency, Div. of Legal & Research Servs., to Rep. Zack Fields, at 4 (May 20, 2019) ("[T]he use of public funds for a partisan political purpose is unconstitutional, and therefore not a normal performance of official duties") (Exhibit 13).

[40] AS 15.13.090(a).

[41] AS 15.13.135(b).

[42] AS 15.13.050(a). The Plaintiff provided additional fact allegetaions, considered by the Court only to understand the Plaintiff's theory of the allegation. Plaintiff argues that Governor Dunleavy's conduct violate Alaska's campaign finance laws because neither the mailers nor the Facebook ads clearly identified who paid for the

If the allegations are true, Governor Dunleavy's conduct could constitute a violation of the law, which would constitute neglect of duty. If he understood the laws, and chose to ignore the laws, the act could establish a lack of fitness. On the other hand, if he did not intend to violate the law or did not understand the law, the allegations, if true, could establish his incompetence. The facts and conclusions, therefore, are left to the voters to decide. This allegation is legally sufficient.

3. **Allegations:** "Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to . . ."

   i. "(a) attack the judiciary and the rule of law."

The Constitution for the State of Alaska is divided into separate Articles for the Legislature, Executive and Judicial branches. Implicitly, this State recognizes the separation of powers doctrine.[43] The Alaska Supreme Court has relied upon the existence of that doctrine in making a number of holdings, which have resulted in protecting the authorities reserved for the Executive or Legislative branches.[44] The Constitution grants the Judicial Branch all judicial powers, which necessarily includes interpreting the Alaska Constitution.[45]

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communications or stated that Governor Dunleavy was not acting on behalf of the candidate's campaign. Additionally, Governor Dunleavy allegedly did not register with APOC in advance of distributing these communications.

[43] See, e.g., Bradner v. Hammond, 553 P.2d 1, 5 n.8 (Alaska 1976) (citing Myers v. United States, 272 U.S. 52 (1926)) (prohibiting one branch "from encroaching upon and exercising the powers of another branch").

[44] See, e.g., Pub. Def. Agency v. Superior Court, Third Judicial Dist., 534 P.2d 947, 951 (Alaska 1975) ("When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers"); Rust v. State, 582 P.2d 134, 138 (Alaska 1978), on reh'g, 584 P.2d 38, n.11 (Alaska 1978) ("Since Article III concerns the executive branch, it can fairly be implied that this state does recognize the separation of powers doctrine").

[45] Alaska Const. art. IV, § 1 ("The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature"); see also ACLU v. Dunleavy, Order Denying Motion to Dismiss, 3AN-19-

Article XII, Section 5 requires each public officer to take an oath of office. That oath requires the officer to support and defend the Constitution of the State of Alaska and to faithfully discharge their duties.

Plaintiff alleges that after Governor Dunleavy prepared a proposed budget for FY 2020, which he submitted to the Legislature, the Alaska Supreme Court issued its decision in State v. Planned Parenthood of the Great Northwest,[46] which held unconstitutional a regulation and statute that limited the availability of Medicaid funding for medically necessary abortions. When Governor Dunleavy issued his line-item vetoes to the appropriations bill passed by the Legislature, he allegedly reduced the funding to the appellate courts to provide $334,700 less than he had originally proposed and that the Legislature had approved. If the allegation stopped here, the veto was within the Governor's discretion and, therefore, not a violation of his duties. As such, it could not be a grounds for recall.[47]

However, Plaintiff further alleges that Governor Dunleavy explained his veto as reflecting his "oppos[ition] to State funded elective abortions. . . The annual cost of elective abortions is reflected by this reduction."[48] Plaintiff alleges that the veto message demonstrates an attempt by Governor Dunleavy to influence and undermine the judicial branch's independence.

08349CI, at 8-10 (Alaska Super. Dec. 12, 2019) (ruling that courts may review executive vetoes for constitutional compliance and not necessarily dismiss on political question grounds").

[46] 436 P.3d 984 (Alaska 2019).

[47] See von Stauffenberg, 903 P.2d at 1060 ("elected officials cannot be recalled for legally exercising the discretion granted to them by law").

[48] STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, VETO CHANGE RECORD DETAILS at 122 (June 28, 2019) (Exhibit 14).

If the allegations are true, Governor Dunleavy breached his oath of office to defend the Constitution by attempting to infringe upon the powers reserved to the Judicial branch, thus constituting a neglect of duties. If true that Governor Dunleavy attempted to influence or undermine the independence of the judiciary, his actions could constitute a lack of fitness. Last, if Governor Dunleavy was unaware of his duty to not encroach upon the powers of another branch, that could constitute "incompetence." This allegation is legally sufficient.

ii. "(b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities."

Plaintiff alleges that after the Legislature completed its annual budget process for FY 2020, Governor Dunleavy line-item vetoed approximately $440 million, on top of $270 million in cuts already included in the appropriations bill, for a total of 182 specific programs vetoed spanning health, education, and welfare. After failing to override Governor Dunleavy's vetoes in a 37-1 vote, the Legislature passed a new appropriations bill to restore most of the vetoed funds. Governor Dunleavy line-item vetoed the second appropriations bill by $220 million.

The Alaska Constitution, unlike the United States Constitution, provides affirmative rights to its citizens in the areas of health,[49] education,[50] and welfare.[51] The Alaska Supreme Court has not defined these rights, but has recognized that "the Legislatures do not have to fund or fully fund any program (except, possibly,

[49] Alaska Const. art. VII, § 4 ("The legislature shall provide for the promotion and protection of public health").
[50] Alaska Const. art. VII, § 1 ("The legislature shall by general law establish and maintain a system of public schools open to all children of the State").
[51] Alaska Const. art. VII, § 5 ("The legislature shall provide for public welfare").

constitutionally mandated programs)".[52]

Plaintiff argues that because the Legislature has a constitutional duty to provide for the health, education, and welfare of Alaska's citizens, the Governor cannot wield his veto power to preclude the Legislature from fulfilling that duty. Plaintiff argues that Governor Dunleavy went beyond the legitimate exercise of his veto power and breached his duty to respect the Legislature's role to fund core government services. Plaintiff argues that voters should decide the level of harm due to the incompetently reduced budgets.

Governor Dunleavy has the Constitutional authority to veto bills passed by the Legislature.[53] The Governor has broad discretion when exercising his line-item veto authority, but the Legislature always maintains the ability to override a Governor's veto.[54] As such, a Governor can never prevent the Legislature from fulfilling its Constitutional duties with his/her veto power.[55] This allegation, even if true, cannot establish grounds for recall based on a lack of fitness, incompetence, or neglect of duty.

4. **Allegation:** "Governor Dunleavy acted incompetently when he mistakenly vetoed approximately $18 million more than he told the Legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over $40 million in additional federal Medicaid funds."

Plaintiff alleges that Governor Dunleavy vetoed significantly more Medicaid

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[52] Simpson v. Murkowski, 129 P.3d 435, 447 (Alaska 2006).
[53] Alaska Const. Art. II, §15 ("The Governor may veto bills passed by the Legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objections, to the house of origin").
[54] See Alaska Const. Art. II, §16.
[55] Opp'n. to Pl.'s Mot. for Summ. J. and Cross Mot. for Summ. J. 51.

funds than he intended. He allegedly intended to veto $27,004,500 of funding for adult dental benefits, but miscalculated due to his misunderstanding of the federal matching rate.[56] He explained that he kept "$18,730,900 in [state] general funds that . . . [he] never intended to be vetoed" in June 2019.[57] It is alleged that this mistake would have equated to roughly a $40 million loss of federal funds.

A mistake can be a measure of competence.[58] Governor Dunleavy's alleged mistake, if true, could be interpreted as "incompetence." Voters have the right to weigh the seriousness and circumstances of the alleged mistake.

Conclusion

This decision best preserves the right of the voters. The Alaska Constitution gives the voters great power to act independently of their elected officials. Initiative and referendum powers allow the public to legislate and veto laws regardless of what the Legislature and Governor may say or want. Similarly, the recall process allows the voters to step in and replace an elected official before the end of their elected term.

Defendant's and Intervenor's arguments have a basis in law and logic, but would significantly limit the recall power of the public as granted by the Legislature. This Court declines to usurp the authority vested in the Legislative branch by our Constitution to prescribe the recall process. If the Legislature determines that this Court's decision places too great of a burden on an elected official to defend their exercise of discretion as

[56] Calculations explained at Motion for Summary Judgment 50.
[57] STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, HB 2001 FY20 Post-Veto Change Record Detail at 27 (Aug. 19, 2019) (Exhibit 18).
[58] See also Meiners, 687 P.2d at 294 ("[T]here is no doctrine that 'substantial compliance' with the procedures is sufficient and that technical errors will be overlooked after-the-fact").

granted them by their office, it is the Legislature that has the authority to create more protective rules for elected officials, not the Court.

This Court reverses the Director of Elections' decision to reject the recall application, except for allegation 3(b), which shall be struck. The third allegation in the recall petition shall be changed to: "(3) Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law."[59] Each of the remaining allegations is legally sufficient and is stated with particularity such that the elected official can adequately respond to the allegations.

The Director of Elections shall certify the remaining recall application pursuant to AS 15.45.540 and shall prepare the petitions as required by AS 15.45.560. The petitions shall be prepared and issued to the applicants no later than February 10, 2020, unless that date is stayed by the Alaska Supreme Court.

Plaintiff's motion for summary judgment is granted in part and denied in part. Defendant's and Intervenor's cross-motions for summary judgment are denied in part and granted in part.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 14th day of January, 2020.

I certify that on 1/14/2020 a copy of the following was mailed/emailed to each of the following at their addresses of record.
S. Dransky; J Feldman; S Gottstein; S. Kendall; J Lindemuth; M Paton-Walsh; C Richards; M Bayless; B. Jamieson
Administrative Assistant

ERIC A. AARSETH
Superior Court Judge

[59] The deletion of the "(a)" and replacing the semi-colon with a period do not change the meaning of the allegation.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY, an unincorporated association, Plaintiff, v. STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS, Defendants, STAND TALL WITH MIKE, an independent expenditure group, Intervenor.	Case No. 3AN-19-10903 CI **STWM'S MOTION FOR STAY PENDING EXPEDITED APPEAL** (CORRECTED)

COMES NOW, Intervenor Stand Tall With Mike ("STWM"), by and through counsel, and moves this Court to stay its order pending the outcome of STWM's appeal to the Alaska Supreme Court.

I. INTRODUCTION

Alaska's system of recall for cause hangs in the balance in the case. If this Court's order is affirmed, Alaska's recall system is effectively transformed from a "for cause" recall process to a purely political recall process. But affirmance is uncertain or unlikely, and the stakes warrant a stay of this Court's order. A stay would permit the Alaska Supreme

Court to construe—for the first time—the statutes providing for recall of state officers and determine the nature of the recall process in Alaska. That court should have the chance to determine whether Recall Dunleavy's ("RDC") recall petition is sufficient under existing law or improperly subjects Governor Dunleavy to recall "for legally exercising the discretion granted to [him] by law."[1]

II. ARGUMENT

A. Standard

"[T]he superior court has discretion to grant a stay concerning a non-monetary judgment."[2] The court's discretion is "guided by 'the public interest,'"[3] and the standard for granting a stay resembles the standard for granting a preliminary injunction.[4] Where only the party seeking the stay faces irreparable harm, "it will ordinarily be enough that the [party] raised questions goin[g] to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation."[5] But if the party seeking a stay "does not stand to suffer irreparable harm, or where the party against whom the [stay] is sought will suffer injury if the [stay] is issued," the party seeking the stay must show "probable success on the merits" [6] "If the latter part of this standard comes into play, the court is to use a 'balance of hardships' approach. . . . weigh[ing] 'the harm that will be suffered by [one party] if a[] [stay] is not granted, against the harm that will be imposed upon the [other party] if the [stay] is granted."[7]

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[1] *von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995).

[2] *Keane v. Local Boundary Comm'n*, 893 P.2d 1239, 1249 (Alaska 1995).

[3] *Id.*

[4] *See Id.* (holding that the test presented in *A.J. Industries, Inc. v. Alaska Public Service Commission*, 470 P.2d 537 (Alaska 197), applies).

[5] *A.J. Indus.*, 470 P.2d at 540 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 260 F.2d 738, 7640 (2d Cir. 1953)).

[6] *Id.* (footnotes omitted).

[7] *Keane*, 893 P.2d 1250 n.22.

STWM is the only party likely to suffer irreparable harm and must show only that it raises "a fair ground for litigation."[8] But STWM is also likely to succeed on the merits, and even if RDC faces irreparable harm, its harm from delay is less than STWM's harm from a hasty implementation of the Court's order.

B. STWM Is the Only Party Likely to Suffer Irreparable Harm.

STWM members will suffer three species of irreparable harm if the Court's order is not stayed pending appeal.

First, STWM's members will be called upon to defend the Governor against all twelve charges the Court held legally sufficient.[9] Because the Governor may not place his rebuttal statement before voters at the petition stage,[10] STWM's members must spend their time and money communicating with voters about the recall petition's deficiencies. Their efforts (money and individual volunteer efforts) will be irreparably diluted and rendered futile if they must expend resources contesting charges that the supreme court ultimately holds to be invalid. There is no remedy by which STWM can recover those resources—particularly the time and volunteer efforts.

Second, STWM's members face irreparable harm if the Governor is distracted from implementing the agenda that drew votes from 145,000 Alaskans (including STWM's members) during the last general election. STWM's members campaigned for the Governor's election because they believed in his platform. If the Governor faces a recall campaign, he will be less able to focus on fulfilling his campaign promises while defending against this recall effort. STWM's members will not be able to recover the lost chance to put the state on a firmer fiscal footing. This is all the more true if the recall election is called and the Governor removed from office before the supreme court can rule. Alaska law

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[8] *Id.*

[9] While four of RDC's "bullet points" remain, the "and/or" clause was maintained, meaning the Governor is forced to defend himself against 12 individual charges in 200 words or less, plus mount an expensive statewide campaign barely a year after taking office.

[10] *See* AS 15.45.680.

favors "electoral repose,"[11] and a completed recall election could moot STWM's important constitutional and statutory arguments.

Third, STWM's members—along with all Alaskans—face irreparable harm if Alaska's system of recall for cause is supplanted by recall procedures that permit vague charges aimed at officeholders' exercise of lawful discretion. RDC's recall application differs from the applications other courts have considered in alleging grounds that impinge on a governor's discretion. If an election is held, future governors and other state officials may hesitate to use the power of their offices to rein in spending or take other necessary actions, and voters will regard general elections as contingent decisions subject to the continuous threat of recall whenever the political winds change.

In seeking to avoid this irreparable harm, STWM's members also vindicate the interests of Alaskan voters in an orderly recall process. As explained below, the supreme court is likely to hold insufficient at least one of the twelve charges this Court approved. If that decision comes during or after the signature gathering effort, voters will be asked to either re-sign the finally-approved version of the recall petition, or RDC will seek to have the already-collected signatures based on a flawed petition counted toward the required number. This will set the table for more legal disputes, create confusion among the signers and the voting public, and erode the credibility and integrity of the recall process. Such a result does not accord with Alaska's orderly process of recall for cause. It is better for all to measure twice and cut once.

By contrast, RDC faces no irreparable harm from a stay. It need only gather signatures and file its petition before the last 180 days of the Governor's term.[12] A delay to ensure the recall charges satisfy the law will not make it harder for RDC to gather signatures. Surely, signature-gathering is easier in April or May than in February. If the charges are certified at the direction of the supreme court—and if RDC can gather signatures for the certified charges— the Division of Elections must hold a special election

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[11] *See von Stauffenberg*, 903 P.2d at 1058 (referring to municipal elections).

[12] *See* AS 15.45.610; AS 15.45.630(2).

"not less than 60 days, nor more than 90 days," after determining that the petition was properly filed.[13] If a general or primary election falls within the statutory time period for holding a special election, the "special election shall be held on the date of the primary or general election."[14] Presumably, RDC wishes the greatest number of voters to participate in a recall election and seeks to submit its recall to voters at a regularly scheduled election. STWM is prepared to press its appeal on an expedited schedule that will permit RDC to submit any recall effort (assuming it is able to gather signatures for it) during one of the two already-scheduled statewide elections in 2020 (the August primary, or the November general elections).

C. STWM Is Likely to Prevail on the Merits.

STWM need only show that it raises a serious issue on appeal.[15] It does so because it is likely to prevail on the merits of its appeal. As STWM argued to this Court, *Meiners v. Bering Strait School District*[16] does not control this case.[17] *Meiners* addressed a different practical and statutory context. And it was eroded by the Alaska Supreme Court's decision in *von Stauffenberg v. Committee for an Honest and Ethical School Board.*[18] Accordingly, *Meiners* provides no basis for certifying a political recall application that alleges only vague and conclusory grounds, nearly all of which represent policy differences with the Governor. RDC's application must meet the statutory criteria in AS 15.45.510, and following *von Stauffenberg*, the recall application must avoid targeting the lawful exercise of the Governor's discretion.[19] As STWM has explained at length in its briefs, RDC's application falls short.

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[13] AS 15.45.650.

[14] AS 15.45.650.

[15] *Id.*

[16] 687 P.2d 287 (Alaska 1984).

[17] *See* STWM Mot. Summ. J. at 15; STWM Reply at 7–8.

[18] 903 P.d 1055 (Alaska 1995); *see* STWM Mot. Summ. J. at 11–12; STWM Reply at 7–8.

[19] *von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1060 (Alaska 1995).

The Court found STWM's arguments unpersuasive. The supreme court has not expressly overruled *Meiners*, and this Court considered itself bound by that ruling. But STWM will likely succeed on appeal. The supreme court has addressed *Meiners* in a recall case only once in the thirty-five years since it was decided, and in doing so, failed to re-state *Meiners*'s permissive standard. This case presents an opportunity for the supreme court to clarify that *von Stauffenberg*'s protections for officeholders' lawful discretion control over *Meiner*'s solicitude for under-resourced voters attempting to recall a town official. In light of the differences between Title 15 and Title 29, the practical differences between this recall effort and the recall effort in *Meiners*, the supreme court's tepid treatment of *Meiners* in *von Stauffenberg*, and the vagueness of RDC's stated grounds, the supreme court will hold insufficient one or all of RDC's grounds for recall.

III. CONCLUSION

STWM will suffer irreparable harm if RDC's recall application is certified while this case is pending on appeal. Because STWM raises a serious issue on appeal—and is likely to prevail—the Court should stay its order pending resolution of this weighty case in the Alaska Supreme Court.

DATED this 15th day of January, 2020.

LAW OFFICES OF CRAIG RICHARDS

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and

LANE POWELL LLC

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY, an unincorporated association, Plaintiff, v. STATE of ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS, Defendants, STAND TALL WITH MIKE, an independent expenditure group, Intervenor.	Case No. 3AN-19-10903 CI

NON-OPPOSITION TO INTERVENOR'S MOTION FOR STAY

Defendants, the Alaska Division of Elections and its Director Gail Fenumiai, do not oppose Intervenor Stand Tall With Mike's (STWM) Motion for Stay. Although any harm to the Division of Elections from this Court's order is administrative in nature, the Division agrees with Stand Tall With Mike that there is a strong probability of success for the Division and Intervenors on the merits in the anticipated appeal. And the Division's primary interest is in protecting certainty with respect to any potential election.

As with other elections cases, the Division is hopeful that, whether a stay is granted or not, the Alaska Supreme Court will act promptly before too many resources

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are expended preparing for an election that may or may not occur. And in this case, a stay will assure that there will be a definitive decision prior to any election preparation.

The Division is also mindful of the potential for litigation over signatures gathered prior to a decision from the Supreme Court, should that Court's decision result in further changes to the statement of grounds. If more, but not all, of the grounds are struck, some voters may have signed the petition based on an invalid ground. The Court may then have to resolve what happens with those signatures, which will extend the length of the litigation and potentially add to the uncertainty.[1]

On the question of likelihood of success on the merits, the Division stands by its original certification decision. The statutory scheme contemplates a role for the Division Director to determine if the recall sponsors have met both the particularity requirement and the legal grounds requirement. The middle ground approach adopted by the Alaska Supreme Court in *Meiners* contemplates both factual and legal sufficiency—thresholds that have to be met within the 200-word statement.[2] Requiring sponsors to allege facts with enough particularity that the elected official, the director, and voters can understand and evaluate them is not an "artificial technical hurdle."[3] To the contrary, ensuring that there are substantive thresholds that give meaning to the statutory grounds is the middle road approach—otherwise, under this Court's decision Alaska's recall

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1 *See* Stand Tall With Mike's Mot. for Stay at 4.

2 *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 294 (Alaska 1984); AS 15.45.500.

3 *Id.* at 296.

system effectively allows a purely political recall, which is not what the constitutional convention delegates or the legislature intended. Because this Court's decision is inconsistent with Alaska precedent and fails to give meaning either to the statutory grounds for recall or the Division's gatekeeper function, the Division believes its appeal will succeed on the merits.

That said, the Division stands ready to execute the court's order and distribute petition booklets if no stay is granted by either this court or the Alaska Supreme Court.

DATED January 22, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: M.A. Paton-Walsh

Margaret Paton-Walsh
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY, an unincorporated association, Plaintiff, v. STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-10903 CI
STAND TALL WITH MIKE, an independent expenditure group, Intervenor.	

PLAINTIFF'S OPPOSITION TO STWM'S MOTION FOR STAY PENDING APPEAL

This court ordered the Division to provide petition booklets to Plaintiff by no later than February 10, 2020, so that Plaintiff can begin collecting the more than 71,0000 signatures needed to cause a recall election. Intervenor Stand Tall With Mike ("STWM") seeks a stay of that order pending appeal, arguing it will face irreparable harm if a stay is not entered. The motion should be denied. STWM faces no irreparable harm if Plaintiff begins gathering signatures. On the other hand, a stay would cause irreparable harm to Recall Dunleavy, and STWM cannot show a clear probability of success on the merits. Thus, this court should promptly deny the stay request.

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I. BACKGROUND

Plaintiff filed its application to recall Governor Michael J. Dunleavy with the Division of Elections on September 5, 2019.[1] The Director of the Division of Elections, relying on the opinion of Attorney General Kevin Clarkson, refused to certify the application.[2]

Recall Dunleavy filed this lawsuit the following day, November 5, 2019.[3] In seeking expedited consideration,[4] Recall Dunleavy pointed out that, "every day of delay denies the citizens of Alaska the opportunity to lawfully exercise their right to recall . . . as guaranteed by article XI, section 8 of the Alaska Constitution."[5]

At oral argument on January 10, this court determined that one factual allegation should be struck from Plaintiff's recall application, and otherwise the recall application

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1 *See* Letter from Att'y Gen. Kevin G. Clarkson to Gail Fenumiai, Dir. of Elections, *Review of Application for Recall of Governor Michael J. Dunleavy*, at 1 (Nov. 4, 2019) [hereinafter Att'y Gen. Clarkson Op.] (Exhibit 2 to Plaintiff's Motion for Summary Judgment (Nov. 27, 2019) [hereinafter Plaintiff's S.J. Mot.]).

2 *See* Att'y Gen. Clarkson Op. at 1 (Exhibit 2 to Plaintiff's S.J. Mot.).

3 *See* Plaintiff's Complaint (Nov. 5, 2019).

4 Plaintiff's Motion for Briefing and Decision Schedule (Nov. 6, 2019); *see also* Plaintiff's Emergency Motion for Expedited Scheduling Conference to Address Briefing and Decision Schedule (Nov. 5, 2019) [hereinafter Plaintiff's Emergency Mot.]; Affidavit of Jahna M. Lindemuth (Nov. 5, 2019).

5 Plaintiff's Emergency Mot. at 2.

should have been certified.[6] This court ordered the Division of Elections to prepare and issue recall petitions to Plaintiff "no later than February 10, 2020."[7]

After issuing its oral decision, this court indicated that it would not be inclined to grant a stay, and that a request for a stay, if any, should be made to the Alaska Supreme Court.[8] STWM never conferred with Recall Dunleavy on whether Plaintiff would non-oppose a motion for stay filed in the first instance with the Alaska Supreme Court.

II. STANDARD OF REVIEW

Alaska Civil Rule 62 gives this court the ability to grant a stay pending appeal.[9] "In considering whether to grant [a stay], the [superior] court must consider criteria much the same as it would in determining whether to grant a preliminary injunction."[10]

Preliminary injunctions may be ordered when a party meets "either the balance of hardships or the probable success on the merits standard."[11] Under the balance of

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6 *See* Order re: Plaintiff's Motion for Summary Judgment, Defendants' Cross-Motion for Summary Judgment, and Intervenor's Cross-Motion for Summary Judgment at 18 (Nov. 14, 2019) [hereinafter S.J. Order].

7 *Id.*

8 *Id.* ("The [recall] petitions shall be prepared and issued to the applicants no later than February 10, 2020, unless that date is stayed *by the Alaska Supreme Court*." (emphasis added)).

9 Alaska R. Civ. P. 62(d). The State would not need to provide any bond or other security as part of a stay. *See* R. 62(e). But STWM could be ordered to provide a supersedeas bond. *See* R. 62(d).

10 *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1973) (citing 7 J. Moore, Federal Practice 62.05, at 62-24 (2d ed. 1972)).

11 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (citing *A. J. Inds., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970), *modified in other respects*, 483 P.2d 198 (Alaska 1971)).

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hardships test, courts must balance "the harm [a party] will suffer without the injunction against the harm the injunction will impose on the [other party.]"[12] A stay "is warranted under [the balance of hardships] standard [only] when . . . : '(1) the [moving party is] . . . faced with irreparable harm; (2) the opposing party [is] . . . adequately protected; and (3) the [moving party] . . . raise[s] serious and substantial questions going to the merits of the case . . . ."[13]

But "where one party will invariably see unmitigated harm to its interests,"[14] courts must instead apply "the probable success on the merits test."[15] For the probable success on the merits standard, courts are directed to apply "the heightened standard of a '*clear* showing of *probable* success on the merits.' "[16]

III. ARGUMENT

A. Recall Dunleavy Would Suffer Irreparable Harm From A Stay Precluding It From Collecting Signatures While An Appeal Is Pending.

STWM argues that this court should review its request for a stay pending appeal under the less stringent "balance of hardships" test.[17] STWM is incorrect because,

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12 *Id.* (citing *A. J. Inds.*, 470 P.2d at 540).

13 *Id.* (quoting *State v. Kluti Kaah Native Vill. Of Copper Ctr.*, 831 P.2d 1270, 1273 (Alaska 1992)).

14 *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 979 (Alaska 2005).

15 *Alsworth*, 323 P.3d at 54 (citing *Metcalfe*, 110 P.3d at 979).

16 *Metcalfe*, 110 P.3d at 978 (emphasis added) (quoting *Kluti Kaah Native Vill. Of Copper Ctr.*, 831 P.2d at 1272).

17 *See* STWM's Motion for Stay Pending Expedited Appeal at 2-3 (Jan. 15, 2020) [hereinafter STWM's Mot. for Stay].

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contrary to STWM's assertions, Recall Dunleavy would face irreparable harm from any further delay in its ability to collect signatures to cause a recall election as soon as possible.

46,405 qualified Alaskans signed the recall application that this court determined was valid and that the Defendants wrongfully denied. The citizens have a constitutional right to recall the Governor, and now that the application has been certified, the next phase is the collection of more than 71,000 signatures. The process is intended to move quickly. When the next round of signatures is submitted, the Division has just 30 days to validate the signatures.[18] The Division then *must* schedule a recall election within 60 to 90 days of the next round of signatures being validated.[19] Only if a primary or general election is scheduled during that window may the Division avoid scheduling a separate special election.[20]

If the recall application had been lawfully certified on November 4, 2019, the day of the unlawful denial, Plaintiff expects it could have submitted sufficient signatures by the end of 2019, causing a recall election to be scheduled in early spring.[21] Alaskans could then have had a different governor address the legislature's budget and other laws proposed during this upcoming session. Any and all delay in the recall process irreparably

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18 AS 15.45.620.
19 AS 15.45.650.
20 AS 15.45.650.
21 Plaintiff collected the signatures required for its recall application in approximately five weeks.

harms the rights of the citizens of the State of Alaska to cause a recall election. Nothing other than the timely distribution of recall petition booklets could adequately protect Recall Dunleavy's interests.

Because Recall Dunleavy would be harmed by an additional stay, this court should more appropriately analyze STWM's request under "the probable success on the merits test."[22]

B. STWM Will Not Suffer Irreparable Harm.

STWM makes specious and speculative arguments that it will be irreparably harmed if a stay is not entered.[23] The overarching answer to STWM's concerns is an expedited appeal. This is an elections case, and the Alaska Supreme Court is equipped to expedite its decision so that it rules before a special election is held. Even assuming it takes Recall Dunleavy only 60 days to collect the next round of signatures, so that they are validated by May 10, the Supreme Court has ample time to receive briefs and render a decision before the Division validates signatures and has to schedule the special election.

STWM will not be harmed if Recall Dunleavy collects signatures while an appeal is pending. Any risk of an adverse decision is on Recall Dunleavy, which will expend its

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22 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (citing *Metcalfe*, 110 P.3d at 979).

23 The Division has not joined the request for stay. Recall Dunleavy recognizes that the Division may suffer some harm through the printing of recall petition booklets. To that end, Recall Dunleavy is amenable to posting a bond to cover the cost of printing those booklets.

time and money on the signature-gathering. STWM argues it would harmed because it would be "forced" to expend resources to campaign against the recall while the signature-gathering is ongoing. But this is not required; it is STWM's choice.

STWM also argues that it would be irreparably harmed because the Governor would be distracted from implementing his agenda. However, a governor is always at risk of distraction by citizens who criticize his performance. That is the nature of holding an elected office. Further, every elected official serves subject to recall; having to deal with a recall effort cannot be considered irreparable harm.

STWM's third argument of irreparable harm is just a reiteration of the legal arguments that this court already has rejected. Although STWM characterizes this court's holding as allowing vague charges to suffice for cause, this court correctly ruled that Plaintiff had alleged cause for recall based on the definitions of neglect of duty, lack of fitness, and incompetence applied by Alaska courts and attorneys general over the last thirty years.[24]

C. STWM Cannot Make A "Clear Showing Of Probable Success On The Merits."

Given the irreparable harm Recall Dunleavy would suffer from additional delay in the recall process, STWM must make a clear showing of probable success on the merits for this court to grant a stay pending appeal.[25] This court has already rejected STWM's

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24 *See* S.J. Order.

25 *See Alsworth*, 323 P.3d at 54-56.

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legal arguments and ruled for Plaintiff. STWM does not come close to meeting the high bar of showing clearly that it will probably succeed with its appeal.

This court concluded that the State illegally withheld certification of Plaintiff's recall petition, ignoring decades of case law and precedent and adopting new standards to deny Alaskan voters the right to a recall.[26] This court did not blindly accept Recall Dunleavy's legal assertions. This court carefully considered the hundreds of pages of briefing on the subject, listened to over an hour of argument from all parties, and then only granted Recall Dunleavy's motion in part, striking one of the factual grounds for recall which it determined was not legally sufficient.[27] In doing so, this court correctly applied Alaska Supreme Court precedent, and the precedent from three other superior court decisions on recall, to order the certification of modified grounds for recall against Governor Dunleavy.[28] This court followed precedent to conclude that Alaska's recall statutes must be liberally construed, that the legislature's silence on the grounds for recall supports the definitions of cause that the court used, and that ties should go in favor of letting voters decide this inherently political question.[29]

Although it is certainly possible that the Alaska Supreme Court could reach an opposite conclusion, the Supreme Court would have to overturn decades of its own

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26 *See id.*
27 *See id.*
28 *See id.*
29 *See id.*

precedent to do so. STWM effectively concedes that overturning *Meiners* is indeed what it will ask the Supreme Court to do.[30] Given the constitutional right afforded to voters with respect to recall, the Recall Opponents are, at a minimum, unlikely to succeed on appeal. Their chances are speculative at best and STWM thus has not shown the *clear* likelihood of success on the merits that is required for this court to grant a stay.[31] This court should therefore deny STWM's request for a stay pending appeal under the probable success on the merits test.

IV. CONCLUSION

Because a stay would cause irreparable harm to Recall Dunleavy and Alaskan voters, STWM cannot show any reasonable harm in the absence of a stay, and STWM cannot show a clear probability of success on the merits, this court should promptly deny STWM's motion for stay pending appeal.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 21 day of January 2020.

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30 *See* STWM's Mot. for Stay at 5-6.
31 *See Alsworth*, 323 P.3d at 54-56.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY, AN UNINCORPORATED ASSOCIATION, Plaintiff, v. STATE OF ALASKA, DIVISION OF ELECTIONS, AND GAIL FENUMIAI, DIVISION OF ELECTIONS, Defendant,	
STAND TALL WITH MIKE, an Independent expenditure group, Intervenor.	3AN-19-10903CI

ORDER GRANTING STAY PENDING EXPEDITED APPEAL

On January 14, 2020, this Court ordered the Director of Elections to prepare and issue petition booklets for circulation no later than February 10, 2020. Each petition booklet would contain the statement of grounds as approved by this Court. The Intervenor and Defendant have stated that they intend to appeal this Court's order. Plaintiff has stated that it intends to begin the second round of signature gathering in support of its recall efforts.

The Intervenor and Defendant are concerned that if the Alaska Supreme Court strikes one or more grounds for recall on appeal, the public would be confused as to which grounds are actually at issue. This Court agrees that such confusion would represent a harm to the Intervenor and the public interest. The burden would lie on the Intervenor to provide clarity for the public. This Court finds that the absence of a

reasonable cure to resolve the potential confusion constitutes an irreparable harm. This Court agrees that the Intervenor and Defendant raise a serious issue on appeal.

This Court finds that the Intervenor has met the burden for a stay and GRANTS Intervenor's motion to stay this matter pending expedited resolution in the Alaska Supreme Court. This Court orders Defendant and Intervenor to file any appeal with the Alaska Supreme Court by Monday, February 3, 2020.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 30th day of January, 2020.

ERIC A. AARSETH
Superior Court Judge

I certify that on 29 *January, 2020, a copy was mailed to:*
Olanshy; Feldman; Gottstein; Kendall; Lindemuth; Paton; Walsh; Richards; Baylous; Jamieson
Alison Shlom, Law Clerk

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKANS FOR BETTER ELECTIONS,
Plaintiff,

vs.

KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA and STATE OF ALASKA, DIVISION OF ELECTIONS,
Defendants.

Case No. 3AN-19-09704 CI

ORDER DENYING DEFENDANTS' MOTION FOR STAY PENDING APPEAL

On October 28, 2019, Defendants filed a motion for stay of the Order Granting Plaintiff's Cross-Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment, together with the related orders that 19AKBE should be certified and Defendants must distribute petition signature booklets immediately. Having reviewed the motion and opposition, the Court denies the request for a stay pending appeal.

Trial courts have discretion to grant a stay pending appeal.[1] The parties agree that the legal standard applicable to Defendants' request for a stay of the October 28, 2019 Order is a "heightened standard of a 'clear showing of probable success on the merits.'"[2]

[1] Alaska R. Civ. P. 62.
[2] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (quoting *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1272 n.4 (Alaska 1992)).

It is appropriate to apply this standard to the request for a stay because the irreparable harm Plaintiff faces if a stay is granted cannot be adequately protected by the posting of a bond.[3] The posting of a bond fails to protect the time that Plaintiff will lose to gather signatures by January 20, 2020 in an attempt to place 19AKBE on the November 2020 ballot.

Defendants assert that they are likely to succeed on the merits on appeal because 19AKBE violates the single-subject rule and the Alaska Supreme Court will be in a position to overrule its precedent. As set forth in the October 28, 2019 Order, it is this Court's opinion that 19AKBE does not violate the single-subject rule based on application of the test utilized in eight prior Alaska Supreme Court decisions. To the extent that Defendants argue that the Alaska Supreme Court is likely to overrule its precedent, the Court notes that the Alaska Supreme Court previously considered this exact question and declined to overrule the prior cases.[4] In *Yute Air Alaska, Inc. v. McAlpine*, the Alaska Supreme Court provided three reasons why it would not overrule its precedent interpreting the single-subject rule: (1) "[I]t is not at all clear that there are workable stricter standards;" (2) "[T]he sponsors of the initiative have relied on our precedents in preparing the present proposition and undertaking the considerable expense and time and effort needed to place it on the ballot;" and (3) "[A]n initiative is an act of

[3] *See Alsworth v. Seybert*, 323 P.3d 47, 54-55 (Alaska 2014).
[4] *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1180-81 (Alaska 1985).

direct democracy guaranteed by our constitution."[5] The Alaska Supreme Court has had two opportunities since the *Yute Air* decision to overrule its precedent and instead has consistently applied the same test. The 2010 *Croft* decision acknowledged that the Alaska Supreme Court has "consistently articulated the substance of the test to reflect" a broad construction of the rule.[6] The Alaska Supreme Court pointed out that "[i]n each of the seven cases in which this court has addressed a single-subject challenge, we upheld the challenged bill or initiative by determining that all provisions related to a single general subject, theme, or purpose."[7]

The Alaska Supreme Court has not addressed the single-subject rule since the 2010 *Croft* decision. But based on the existing caselaw regarding the obligation to follow precedent[8] and the standard applicable to requests to overrule precedent, Defendants have not made a clear showing of probable success on the merits in this case. The Alaska Supreme Court has indicated that it "will overrule a prior decision only when 'clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from

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[5] *Id.*
[6] *Croft v. Parnell*, 236 P.3d 369, 373 (Alaska 2010).
[7] *Id.*
[8] "The doctrine of precedent is a common law doctrine under which courts are bound by prior decisions in their consideration of new cases. Precedent is a judge-made rule designed to constrain judicial decisionmaking by requiring that prior decisions with similar relevant facts be followed or, if they are not followed, that the reasons for departing from the prior rule be explained. Two types of stare decisis have been identified: horizontal stare decisis and vertical stare decisis. Horizontal stare decisis binds the issuing court to its own prior decisions. Vertical stare decisis requires that lower courts of lower rank follow decisions of higher courts. Vertical stare decisis has a stronger effect, in that lower courts generally cannot overrule decisions of higher courts, whereas a court may, given adequate reasons to do so, overrule itself." *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 43-44 (Alaska 2007).

precedent.'"[9] The Alaska Supreme Court further explained that "[a] decision may prove to be originally erroneous if the rule announced proves to be unworkable in practice."[10] Here, it appears that the single-subject rule announced is workable in practice. The *Craft* decision itself is an example of the rule working in practice. In addition, the Court is unaware of changed conditions to overcome the rule of stare decisis.

Because Defendants do not satisfy the heightened standard of a clear showing of probable success on the merits, the Court denies the Motion for Stay Pending Appeal.

DATED at Anchorage, Alaska this 30th day of October 2019.

Yvonne Lamoureux
Superior Court Judge

I certify that on 10-30-19 the above was emailed to the parties of record:

J. Lindemuth
S. Kendall
C. Mills
M. Paton-Walsh

B. Cavanaugh, Judicial Assistant

[9] *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1176 (Alaska 1993).
[10] *Id.*

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, DIVISION OF ELECTIONS, GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA DIVISION OF ELECTIONS, and STAND TALL WITH MIKE, an independent expenditure group, Appellants, v. RECALL DUNLEAVY, an unincorporated association, Appellee.	Case No. S-17706 Superior Court No.: 3AN-19-10903CI

[PROPOSED] ORDER GRANTING EMERGENCY MOTION TO LIFT STAY

Upon full consideration of Appellee Recall Dunleavy's Emergency Motion to Lift Stay, and any opposition thereto, it is hereby ORDERED that Recall Dunleavy's Motion is GRANTED.

The Division of Elections is hereby ordered to deliver recall petition booklets to Recall Dunleavy [immediately or no later than _____].

Entered at the direction of an individual justice.

Dated at Anchorage, this ____ day of February, 2020.

Clerk of the Appellate Courts

_____
Meredith Montgomery

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February 2020, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

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